Supreme Court, U. S.
FILED
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(2)

No. 97-804

In The

# Supreme Court of the United States

October Term, 1997

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COUNTY OF STANISLAUS, A PUBLIC ENTITY;
AND MARY GROGAN, AN INDIVIDUAL;
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

*Petitioners,*

v.

PACIFIC GAS & ELECTRIC COMPANY, *ET AL.*,

*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## BRIEF *AMICUS CURIAE* OF STATES IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in concluding that the filed rate doctrine absolutely bars antitrust review under the Sherman Act of the anticompetitive conduct of a monopoly utility that chooses to purchase from its affiliates a quantity of high-cost gas which a federal agency has merely authorized, but not required, to be imported for sale, when the federal agency has authorized lower-cost supplies to compete with the affiliates' supply.

2. Whether the Ninth Circuit erred in concluding that the *Nantahala/Pike County* exception to the filed rate doctrine was inapplicable to antitrust review under the Sherman Act, and presumably state prudence reviews under Section 1(b) of the Natural Gas Act, of a monopoly utility's purchase of a quantity of high-cost gas which a federal agency has merely authorized, but not required, to be imported, even though the federal agency has given the utility discretion to choose among all federally-authorized imported supplies.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST OF *AMICI CURIAE*.... 1

STATEMENT OF THE CASE ..... 2

1. Introduction ..... 2

2. Proceedings Below ..... 3

REASONS FOR GRANTING THE WRIT ..... 5

I. THE NINTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH A HOLDING FROM THE THIRD CIRCUIT, WITH UNEQUIVOCAL LANGUAGE IN DECISIONS OF THE FOURTH, FIFTH, AND EIGHTH CIRCUITS, WITH DECISIONS OF AT LEAST THREE STATE COURTS OF LAST RESORT, AND WITH DECISIONS OF THE FEDERAL AGENCIES CHARGED WITH IMPLEMENTING THE NATURAL GAS ACT ..... 7

A. Conflict with the Decisions of Other Courts.. 7

B. Conflict with Important Federal Interests .. 11

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT ..... 16

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

Page

**CASES**

Appalachian Power Co. v. Public Service Comm'n, 812 F.2d 898 (4th Cir. 1987) ..... 9

Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n, 829 F.2d 1444 (8th Cir. 1987) ..... 9

General Motors Corp. v. Illinois Commerce Comm'n, 574 N.E. 2d 650 (Ill. 1991) ..... 10

General Motors Corp. v. Tracy, 519 U.S. ___, 117 S.Ct. 811 (1997) ..... 2, 14

Gulf States Utils. Co. v. Public Util. Comm'n, 841 S.W.2d 459 (Tex. Ct. App. 1992) ..... 10

In re Sinclair Machine Products, Inc., 498 A.2d 696 (N.H. 1985) ..... 10

Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600 (3d Cir.), *cert. den.*, 488 U.S. 941 (1988) ..... 7, 8

Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 862 F.2d 69 (3d Cir. 1988) ..... 8

Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988) ..... 5, 9, 16, 17

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) ..... *passim*

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 911 F.2d 993 (5th Cir. 1990), *cert. dism'd*, 502 U.S. 954 (1991) ..... 9

Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507 (1977) ..... 2

Panhandle Producers & Royalty Owners Ass'n v. ERA, 822 F.2d 1105 (D.C. Cir. 1987) ..... 12

## TABLE OF AUTHORITIES – Continued

Page

Panhandle Producers & Royalty Owners Ass'n v. ERA, 847 F.2d 1168 (5th Cir. 1988) ..... 11

Pennsylvania Power Co. v. Pennsylvania Pub. Util. Comm'n, 561 A.2d 43 (Pa. Commw. Ct. 1989), *aff'd*, 587 A.2d 312, (Pa. 1990), *cert. den.*, 502 U.S. 821 (1991) ..... 10

Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n, 465 A.2d 735 (Pa. Commw. Ct. 1983) ..... 4, 11

STATUTES

15 U.S.C. §§ 717 *et seq.* ..... 2

15 U.S.C. § 717(b) ..... 2, 8, 11, 16

15 U.S.C. § 717b ..... 11

15 U.S.C. § 717b(c) ..... *passim*

LEGISLATIVE HISTORY

138 Cong. Rec. H11404 (daily ed. Oct. 5, 1992) ....5, 18

ADMINISTRATIVE DECISIONS AND ORDERS

Amoco Energy Trading Corp., 1 E.R.A. ¶ 70,624 (1986) and 1 E.R.A. ¶ 70,772 (1988) ..... 12

Bonus Energy, Inc., 1 E.R.A. ¶ 70,691 (1987), *reh'g den.*, 1 E.R.A. ¶ 70,702 (1987) ..... 12

Brooklyn Union Gas Co., 1 F.E. ¶ 70,285 (1990) ..... 14

Development Assocs., Inc., 1 E.R.A. ¶ 70,620 (1986) and 1 E.R.A. ¶ 70,765 (1988) ..... 12

## TABLE OF AUTHORITIES – Continued

Page

Dome Petroleum Corp., 1 E.R.A. ¶ 70,601 (1985) and 1 E.R.A. ¶ 70,735 (1987) ..... 12, 13

Doswell Ltd. Partnership, 50 F.E.R.C. ¶ 61,251 (1990) ..... 15

EnTrade Corp., 1 E.R.A. ¶ 70,774 (1988) ..... 13, 14

Kerr-McGee Chemical Corp, 1 E.R.A. ¶ 70,678 (1986) and 1 E.R.A. ¶ 70,840 (1989) ..... 12

Northwest Alaskan Pipeline Co., 1 E.R.A. ¶ 70,580 (1984) ..... 14

Northwest Alaskan Pipeline Co., 1 E.R.A. ¶ 70,585 (1985) ..... 12

Order 380-A, F.E.R.C. Stats. & Regs. 1982-1985, ¶ 30,584 (1984), *aff'd*, Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985), *cert. den.*, 476 U.S. 1114 (1986) ..... 13, 14, 15

Order 500-H, F.E.R.C. Stats. & Regs. 1986-1990, ¶ 30,867 (1989), *aff'd in part and remanded in part*, American Gas Ass'n v. FERC, 912 F.2d 1496 (D.C. Cir. 1990), *cert. den.*, 498 U.S. 1084 (1991) ..... 15

Pacific Gas Transmission Co., 1 E.R.A. ¶ 70,591 (1985) ..... 12

Pacific Gas Transmission Co., 50 F.E.R.C. ¶ 61,067 (1990) ..... 14, 15

Pacific Gas Transmission Co., 51 F.E.R.C. ¶ 61,086 (1990) ..... 15

Pennsylvania Power & Light Co., 23 F.E.R.C. ¶ 61,325 (1983) ..... 15

Poco Petroleum, Inc., 1 E.R.A. ¶ 70,621 (1986) and 1 E.R.A. ¶ 70,752 (1988) ..... 12

## TABLE OF AUTHORITIES – Continued

Page

Salmon Resources, Ltd., 1 E.R.A. ¶ 70,612 (1985) and 1 E.R.A. ¶ 70,749 (1988) ..... 12

Spot Market Corp., 1 E.R.A. ¶ 70,665 (1986) and 1 E.R.A. ¶ 70,712 (1987) ..... 12

Transwestern Pipeline Co., 43 F.E.R.C. ¶ 61,240 (1988) ..... 15

Windward Energy & Marketing Co., 1 E.R.A. ¶ 70,751 (1988) ..... 12

FEDERAL RULES

Federal Rule of Appellate Procedure 29 ..... 3

## BRIEF *AMICUS CURIAE* OF STATES IN SUPPORT OF PETITIONERS[1]

*Amici Curiae*, state regulatory commissions and their national association, hereby submit their brief *amicus curiae* urging the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and to set the cause for briefing and oral argument. Pursuant to Rule 36.2 of this Court, *Amici* have obtained the written consent of all parties in this case and have filed letters of consent with the Clerk of this Court.

## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici Curiae* are States, as represented by their state regulatory commissions or their respective Attorneys General, and the National Association of Regulatory Utility Commissioners, a quasi-governmental nonprofit organization of state officials from the fifty states and the District of Columbia charged with regulating the distribution of natural gas and electricity within their respective jurisdictions. *Amici* have a vital interest in ensuring just and reasonable retail gas and electric rates to the captive and other customers of monopoly utilities operating within their states. The question in this case is particularly important because the Ninth Circuit's erroneous holding on the *Pike County/Nantahala* exception to the filed rate doctrine could seriously compromise the States' ability in setting retail rates to review whether the monopoly utility purchased prudently among all federally-authorized sources of gas or electricity.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

## STATEMENT OF THE CASE

### 1. Introduction

In 1938, Congress enacted the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* " 'to protect consumers against exploitation at the hands of natural gas companies.' " *General Motors Corp. v. Tracy*, 519 U.S. ___, 117 S.Ct. 811, 821 (1997) ("*GMC v. Tracy*"), quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 520 (1947). Pursuant to Congress' reservation of state authority under Section 1(b), 15 U.S.C. § 717(b), all fifty States conduct prudence reviews of the purchasing practices of monopoly local distribution companies ("LDCs") to protect the States' vital interest in ensuring that the captive residential and commercial customers of the monopoly are charged just and reasonable retail rates for their gas and electric service. *GMC v. Tracy*, 117 S.Ct. at 821.

In an antitrust case in which neither the State of California nor the federal government was a party, the Ninth Circuit's decision below expressly "forecloses any challenge" to the anticompetitive conduct of a California LDC that chooses to purchase from its affiliates a quantity of gas or electricity which a federal agency has merely authorized, but not required, to be imported for sale. *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 864 (9th Cir. 1997). Pet. App. A 13a. No federal agency considers whether the LDC prudently purchased among all federally-authorized supplies, and to date, the discipline of a competitive marketplace does not extend to monopoly LDCs to ensure that they buy the lowest cost supply on behalf of their captive consumers.

As discussed below, the Ninth Circuit's ruling directly conflicts with a holding from the Third Circuit and with decisions from other federal and state appellate courts; directly contradicts orders of the very federal

agencies charged with implementing the NGA; and directly contravenes the NGA by henceforth enabling monopoly LDCs to escape any review of their anticompetitive conduct simply by purchasing from their affiliates gas from Canada which the federal government must automatically approve for import under Section 3 of the NGA, as amended, 15 U.S.C. § 717b(c). Under Federal Rule of Appellate Procedure ("FRAP") 29, the State of California sought to point out all of this in a proffered *amicus curiae* brief, but the Ninth Circuit refused to allow California to file its brief.[2] The Ninth Circuit also blinded itself to the views of the federal agencies affected by its erroneous ruling.[3]

**2. Proceedings Below**

Characterizing the issue as a matter of first impression, the Ninth Circuit asserted in the decision below that the filed rate doctrine "forecloses any challenge" to the lawfulness of a monopoly LDC's purchase for retail sale of a particular volume of gas that the Economic Regulatory Administration ("ERA") of the DOE authorized for import, among other volumes. Pet. App. A 13a. The Ninth

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[2] In direct violation of FRAP 29, the Ninth Circuit panel which issued the decision below not only refused to consider the serious legal errors that California identified, but also prevented the other active circuit judges of the Ninth Circuit from considering such errors in determining whether to grant rehearing *en banc*. California's absolute right to be heard under FRAP 29 was therefore abrogated. Pet. App. D 73a.

[3] The Ninth Circuit denied California's motion for judicial notice of numerous Department of Energy ("DOE") orders that demonstrated that DOE's import approvals were authorizations, not mandates, for the import of particular supplies of gas, and that DOE left to the customer the choice of which supply to purchase. Pet. App. D 73a.

Circuit held that such federal approval is "conclusively reasonable." *Id.*

The Ninth Circuit nevertheless recognized that in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1987) ("*Nantahala*"), a case involving a state prudence review, this Court "left open the possibility that a claim concerning the quantity of [gas] purchased might survive the filed rate doctrine," even though such gas was purchased at rates approved by the Federal Energy Regulatory Commission ("FERC"), if lower cost gas was available elsewhere. Pet. App. A 14a-15a and n.3. The Ninth Circuit, however, concluded that plaintiffs' claims did not "fall within this narrow question," known also as the *Pike County*[4] exception to the filed rate doctrine, because the question in *Nantahala* "concerned *rates* filed with *FERC*," while "this case concerns *volumes* filed with *ERA*." Pet. App. A 15a (emphasis in original). The Ninth Circuit deemed that such "difference is critical . . . because the volumes in the instant case had received ERA approval . . . [and] . . . are *conclusively reasonable*." *Id.* (emphasis in original). The Ninth Circuit also explained that "*Nantahala* concerned action by FERC only," whereas in this case, "along with FERC price approval, PG&E had filed the particular quantity of gas purchased with ERA." *Id.* Based on these perceived distinctions, the Ninth Circuit stated that "the *Nantahala* [or *Pike County*] exception is not applicable." *Id.*

The *Nantahala/Pike County* exception to the filed rate doctrine has long been invoked by States as critical to discharging their statutory responsibility of protecting captive customers from an LDC's unreasonable purchases in light of federally-authorized alternatives. The Ninth

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[4] *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

Circuit's erroneous holding on the *Nantahala/Pike County* exception could therefore seriously compromise the States' authority to ensure just and reasonable retail rates to the LDC's captive customers.

## REASONS FOR GRANTING THE WRIT

The Ninth Circuit is in conflict with the Third, Fourth, Fifth and Eighth Circuits, which have recognized that the *Nantahala/Pike County* exception to the filed rate doctrine permits a challenge to a local utility's purchase of a particular supply of gas or power unless a federal agency has mandated the purchase of such supply by the utility. Absent a federal mandate, these circuits have found that under the *Nantahala/Pike County* exception, a State may review whether a local utility purchased prudently in light of other available federally-authorized alternatives. The decisions of these circuits, as well as the decisions of state courts of last resort and decisions of the federal agencies charged with implementing the NGA that have considered this issue, are all in accord with *dicta* from this Court's opinions in *Nantahala* and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) ("*MP&L*"). In those cases, this Court suggested, without deciding, that a State could challenge the prudence of an LDC's purchase of an amount of power that was approved, but not ordered, by a federal agency in lieu of purchasing such amount from other federally-approved sources. *Nantahala*, 476 U.S. at 972; *MP&L*, 487 U.S. at 374. Congress likewise recognized in 1992 when it amended Section 3 of the NGA, 15 U.S.C. § 717b(c), that, although the federal government must automatically approve the import of gas from countries with a free trade agreement with the United States, such as Canada, States remained free to continue to review the prudence of an LDC's purchased gas costs in setting retail rates. 138 Cong. Rec.

H11404 (daily ed. Oct. 5, 1992) (bipartisan statement of Reps. Sharp, Markey, Moorhead & Lent).

The important issue which this Court left unresolved in *Nantahala* and *MP&L* must now be decided to reconcile the Ninth Circuit's decision with contrary judicial, congressional and federal administrative authorities. Absent action by this Court, nothing will prevent LDCs within the Ninth Circuit and other circuits from seeking to shield from review their anticompetitive and imprudent conduct in purchasing from their affiliates gas or power that a federal agency merely authorized, instead of purchasing similarly-authorized lower-cost supplies that are also available. Indeed, Pacific Gas and Electric Company ("PG&E"), an LDC in California, has already seized on the Ninth Circuit's language in challenging the right of the California Public Utilities Commission ("CPUC") to review the prudence of PG&E's purchase of a particular quantity of gas from one DOE-authorized source rather than from other available, lower cost sources that DOE had also authorized for import. PG&E has also readily admitted that "this issue [of whether the CPUC can lawfully conduct a prudence review of an LDC's discretionary purchases] will continue to arise and cause uncertainty and conflict . . . until it is resolved by a court."[5] This Court should grant certiorari to affirm the *Nantahala/Pike County* exception to the filed rate doctrine and announce a uniform rule governing its application.

---

[5] PG&E Mem. of Pts. & Auths. In Reply to Defendant CPUC's Opp. to PG&E's Mot. for Summ. Judgmt at 3, *Pacific Gas & Electric Co. v. Pub. Utils. Comm'n*, Civ. No. 94-4381 (N.D. Cal. 1997). Although this federal case was subsequently dismissed, PG&E's warning that this issue will continue to arise should be heeded.

## I. THE NINTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH A HOLDING FROM THE THIRD CIRCUIT, WITH UNEQUIVOCAL LANGUAGE IN DECISIONS OF THE FOURTH, FIFTH, AND EIGHTH CIRCUITS, WITH DECISIONS OF AT LEAST THREE STATE COURTS OF LAST RESORT, AND WITH DECISIONS OF THE FEDERAL AGENCIES CHARGED WITH IMPLEMENTING THE NATURAL GAS ACT

### A. Conflict with the Decisions of Other Courts

In direct conflict with the holding of the Third Circuit in *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir.), *cert. den.*, 488 U.S. 941 (1988) ("*Kentucky West I*") and the position of the FERC in that case, the Ninth Circuit asserted that the mere approval of import volumes by a federal agency, standing alone, is sufficient to trigger the filed rate doctrine as an absolute bar to any challenge to the LDC's purchase of a particular quantity of gas from one of several federally-approved sources.

In *Kentucky West I*, the Third Circuit held that the filed rate doctrine did not bar a State from denying the LDC's recovery of the costs of gas purchased from a particular wholesaler at rates that FERC had merely approved, where the LDC had a choice to buy the same quantity of gas from another wholesaler at a lower rate. *Id.* at 609. The Third Circuit recognized that there is "no conflict between FERC's authority and that granted to the PUC" when the PUC reviews whether "the retailer acted with economic prudence in purchasing from one wholesaler rather than another." *Id.* Thus, "[a]lthough *Nantahala* underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether

the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source." *Id.*

The FERC itself filed a brief in *Kentucky West I* in support of the State's right under Section 1(b) of the NGA, and consistent with federal precedent and practice, to review the prudence of an LDC's purchasing options among federally-approved wholesale supplies in setting retail rates. 837 F.2d at 605 n.4; 609.[6]

Two years later, the Third Circuit succinctly explained that the filed rate doctrine precluded a state prudence review of LDC-incurred wholesale costs only when the federal agency *mandates* the wholesale purchase. Contrasting its decision in *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 862 F.2d 69, 73-74 (3d Cir. 1988), with its earlier decision in *Kentucky West I*, the Court explained:

> In *Nantahala Power*, the Supreme Court concluded that under the filed-rate doctrine states may not bar regulated utilities from recovering FERC-mandated wholesale costs. The supremacy clause requires that utilities be permitted to pass through these costs to their retail customers in retail rates, *See Nantahala Power*, 476 U.S. at 967-972, 106 S.Ct. at 2356-60. This preemptive effect attaches not only to wholesale rates, but to other FERC decisions "affect[ing]" those rates. *See id.* at 967, 106 S.Ct. at 2357. If a utility could not pass through these FERC-approved costs, they would become "trapped."

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[6] *Amici* have lodged with this Court copies of the FERC's brief in *Kentucky West I*, which contains a comprehensive review in support of the State's authority under the *Nantahala/Pike County* exception to the filed rate doctrine to challenge the prudence of an LDC's discretionary purchase of high-cost gas approved for sale by the FERC, when lower cost supplies of gas, also approved for sale by the FERC, were available.

> This, the Court concluded, would violate the supremacy clause. These principles were recently reaffirmed by the Supreme Court in *Mississippi Power*. *See Mississippi Power*, 108 S.Ct. at 2439.
>
> In *Kentucky West I* we held that when a utility had the option of purchasing wholesale gas at a lower rate, *Nantahala Power* did not mandate pass-through of an actual cost incurred in the wholesale purchase of natural gas merely because the price at which the gas was purchased had FERC approval. *See Kentucky West I*, 837 F.2d at 609. However, the FERC-approved costs disallowed by the PUC here were *mandatory*, and the principles of *Nantahala Power* and *Mississippi Power* clearly apply to the case before us. *See, e.g., Mississippi Power*, 108 S.Ct. at 2440 (state review of prudence of purchase of power pre-empted where purchase was mandatory because FERC order covered both the cost and quantity of the power to be purchased) (footnote omitted) (emphasis in original).

At least three other circuits have similarly found that the essence of the *Nantahala/Pike County* exception to the filed rate doctrine is whether a retail utility had a *choice* to purchase other power or gas. *Appalachian Power Co. v. Public Service Comm'n*, 812 F.2d 898, 903 (4th Cir. 1987) ("*Pike County* inquiry is meaningless here because there is no alternative source of power for APC to choose . . . "); *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444, 1450 n.4 (8th Cir. 1987) (*Pike County* not applicable because utility "has not chosen to buy energy from Grand Gulf I, in preference to some other source that might, in the end, appear more reasonable. It has been forced against its will by FERC to share the costs of the Grand Gulf I generating capacity."); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993, 1000 (5th

Cir. 1990), *cert. dism'd*, 502 U.S. 954 (1991) (courts have upheld denial of pass-throughs where a utility's purchase of a particular quantity of high cost power at FERC-approved rates was unreasonable if lower cost power was available from another source; "[h]owever, [the *Pike County*] line of cases had no application where FERC has not only determined the rate the utility *must* pay for the power, but also the amount of the power the utility *must* purchase," citing *Nantahala*, 476 U.S. at 972-973) (emphasis added).

Three state courts of last resort have also recognized that the *Nantahala/Pike County* exception to the filed rate is based on whether the utility had the option of buying wholesale power or gas from another source. *General Motors Corp. v. Illinois Commerce Comm'n*, 574 N.E.2d 650, 658 (Ill. 1991) (*Pike County* exception says that "States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge."); *In re Sinclair Machine Products, Inc*, 498 A.2d 696, 705 (N.H. 1985) (upholding right of state commission to inquire whether a retail electric utility prudently participated in a particular wholesale purchase agreement approved by FERC in light of available alternatives); *Pennsylvania Power Co. v. Pennsylvania Pub. Util. Comm'n*, 561 A.2d 43, 51 (Pa. Commw. Ct. 1989), *aff'd*, 587 A.2d 312 (Pa. 1990), *cert. den.*, 502 U.S. 821 (1991) (state review proper when "FERC did not mandate the particular purchase involved in this case, or otherwise limit Penn. Power's options for purchasing power").[7]

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[7] *See also Gulf States Utils. Co. v. Public Util. Comm'n*, 841 S.W.2d 459, 468-471 (Tex. Ct. App. 1992) (state's refusal to pass through unreasonable costs voluntarily incurred by utility is proper exercise of state's authority to review utility's

The Ninth Circuit's holding is irreconcilable with all of these decisions. By deeming conclusively reasonable under the filed rate doctrine an LDC's purchase of a particular supply of gas that a federal agency merely authorized, but did not mandate, for import and sale, the Ninth Circuit not only dismissed an antitrust complaint, but may also have abrogated the States' authority, reserved under Section 1(b) of the NGA, to ensure that the LDC, on behalf of its captive customers, bought the least expensive supply from among all federally-authorized imported or domestic supplies.

### B. Conflict with Important Federal Interests

The Ninth Circuit's decision also flatly conflicts with and thwarts the interests of the federal government in promoting competition among all federally-approved imports or sales of gas or electricity into the same market; in providing customers with a greater choice among competitive supply sources when purchasing gas or electricity; and in reserving for state prudence review the purchasing decisions of monopoly LDCs which are not subject to the discipline of a competitive marketplace.

Prior to 1992, under Section 3 of the NGA, 15 U.S.C. § 717b, ERA routinely issued blanket import approvals, all of which were permissive so that the customer could choose which authorized import to buy. *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 847 F.2d 1168, 1177

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purchasing strategy); *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d at 738 (state authority to determine whether reasonable for utility to pay particular price for federally-approved power in light of utility's alternatives does not overlap with the FERC's authority).

(5th Cir. 1988) ("ERA's policy is to grant blanket authorizations routinely" so that applicants "will face competition from others obtaining the ERA authorizations"); *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 822 F.2d 1105, 1113 (D.C. Cir. 1987) ("no gas would be imported [by a customer] unless it were priced competitively"); *Bonus Energy, Inc.*, 1 E.R.A. ¶ 70,691 at p. 72,666 (1987) (even if gas approved for import, ERA expects customer will purchase gas only if needed and price-competitive). Thus, at the same time that ERA authorized Pacific Gas Transmission Company ("PGT") to import *up to* a specified volume of gas under a long-term import arrangement, ERA also authorized the import of lower cost volumes of Canadian gas into Northern California which PG&E alternatively could have purchased during the period at issue.[8] Indeed, to ensure customer choice among competitive, federally-authorized alternatives, ERA expressly rejected at least four times PGT's attempt to impose conditions to prevent the displacement of PGT's long-term Canadian gas with competitive, less expensive, short-term Canadian gas. *E.g., Northwest Alaskan Pipeline Co.*, 1 E.R.A. ¶ 70,585 at p. 72,367 (1985) ("If the customer finds a short-term purchase more attractive than an existing long-term arrangement, that represents a

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[8] *Pacific Gas Transmission Co.*, 1 E.R.A. ¶ 70,591 (1985); *Dome Petroleum Corp*, 1 E.R.A. ¶ 70,601 (1985) and 1 E.R.A. ¶ 70,735 (1987); *Salmon Resources, Ltd.*, 1 E.R.A. ¶ 70,612 (1985) and 1 E.R.A. ¶ 70,749 (1988); *Development Assocs., Inc.*, 1 E.R.A. ¶ 70,620 (1986) and 1 E.R.A. ¶ 70,765 (1988); *Poco Petroleum, Inc.*, 1 E.R.A. ¶ 70,621 (1986) and 1 E.R.A. ¶ 70,752 (1988); *Amoco Energy Trading Corp.*, 1 E.R.A. ¶ 70,624 (1986) and 1 E.R.A. ¶ 70,772 (1988); *Spot Market Corp.*, 1 E.R.A. ¶ 70,665 (1986) and 1 E.R.A. ¶ 70,712 (1987); *Kerr-McGee Chem. Corp.*, 1 E.R.A. ¶ 70,678 (1986) and 1 E.R.A. ¶ 70,840 (1989); and *Bonus Energy, Inc.*, 1 E.R.A. ¶ 70,691 (1987), *reh'g. den.*, 1 E.R.A. ¶ 70,702 (1987); *Windward Energy & Marketing Co.*, 1 E.R.A. ¶ 70,751 (1988).

signal that the long-term arrangement should be restructured . . . The ERA sees no need to impose conditions on this [short term gas] authorization to protect long-term arrangements from competition . . . "); *Dome Petroleum Corp.*, 1 E.R.A. ¶ 70,601 at p. 72,417 n.4 (1985).

In issuing its approvals, ERA neither dictated the source of the customer's purchase, nor determined that the customer's particular purchase was reasonable in lieu of competitive supply alternatives that ERA had also approved for import. *EnTrade Corp.*, 1 E.R.A. ¶ 70,774 at p. 72,882 (1988) (public interest finding "does not focus . . . on whether the gas can be supplied more economically by domestic or other suppliers in a particular instance").

In 1992, Congress amended Section 3 of the NGA to deem all gas imported from countries with a free trade agreement with the United States to be in the public interest. 15 U.S.C. § 717b(c). Thus, as of 1992, DOE approvals were automatic for gas imported from Canada and Mexico, both of which had signed a free trade agreement with the United States.

FERC in turn issued orders eliminating minimum take and most minimum bill provisions from wholesale contracts in order to give customers, including LDCs, "more freedom to make choices among potential supply sources."[9] Order 380-A, F.E.R.C. Stats. & Regs. 1982-1985, ¶ 30,584 at p. 31,061 (1984), *aff'd, Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. den.*, 476 U.S.

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[9] A minimum take provision required LDCs to physically take a specified amount of gas from the interstate pipeline. A minimum bill provision required LDCs to pay for a specified quantity of gas, even if not taken. Above that quantity, the LDC was free to purchase from any available source.

1114 (1986).[10] FERC made clear that it does "not tell [an LDC] that it must purchase or not purchase any particular gas supply." *Id.* In addition, FERC promoted alternative transportation options to enable a customer to arrange access to supplies other than those of interstate pipelines. *GMC v. Tracy*, 117 S.Ct. at 816-17.

At the same time, both DOE and FERC expressly recognized that when the customer buying the gas is a monopoly utility not subject to competitive market forces, it is for the State to determine whether the monopoly has prudently chosen from among its available supply options on behalf of its captive retail customers. *E.g., Northwest Alaskan Pipeline Co.*, 1 E.R.A. ¶ 70,580 at pp. 72,346-347 (1984) (approved import arrangement gave "greater flexibility to the State of California and to SoCal in determining which gas purchases are most equitable and economical to California consumers," and issue of which gas to take is "a matter outside the ERA's jurisdiction . . . The CPUC is in the best position to make decisions in the interest of the California consumer on this matter . . . "); *EnTrade Corp.*, 1 E.R.A. ¶ 70,774 at p. 72,885 (the "California Public Utility Commission appropriately regulates purchases of gas made by [LDCs] in that State. The ERA has not been convinced that it should intervene in the jurisdiction of another regulatory body."); *Brooklyn Union Gas Co.*, 1 F.E. ¶ 70,285 at p. 72,213 (1990) ("individual purchase decisions [by repurchasers (*i.e.*, LDCs) which import gas from their

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[10] In 1990, FERC completely eliminated the minimum bill obligation in PGT's wholesale agreement with PG&E, so that PG&E was free to purchase all, some, or none of its gas from PGT, subject to the California Public Utilities Commission's prudence review. *Pacific Gas Transmission Co.*, 50 F.E.R.C. ¶ 61,067 at p. 61,132 (1990).

affiliates] can be reviewed by state regulatory authorities"); Order 380-A, F.E.R.C. Stats. & Regs. 1982-1985 ¶ 30,584 at p. 31,061 ("In the case of PG&E's purchasing decisions, the CPUC will have to make [the] determination of [prudence]."); *Pacific Gas Transmission Co.*, 50 F.E.R.C. ¶ 61,067 at p. 61,128 ("CPUC to determine whether PG&E is making prudent choices" among its supply options); *Pacific Gas Transmission Co.*, 51 F.E.R.C. ¶ 61,086 at pp. 61,192-193 (1990) ("prudence of PG&E's purchasing practices is for the CPUC, and not this Commission, to decide"); *Doswell Ltd. Partnership*, 50 F.E.R.C. ¶ 61,251 at p. 61,758 n.18 (1990) (reaffirming that *Nantahala* does not preclude state prudence review of utility purchasing decisions); Order 500-H, F.E.R.C. Stats. & Regs. 1986-1990, ¶ 30,867 at p. 31,576 (1989), *aff'd in part and remanded in part, American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. den.*, 498 U.S. 1084 (1991) (LDC purchase practices would escape any prudence review if States unable to inquire whether LDC acted reasonably in light of alternatives); *Transwestern Pipeline Co.*, 43 F.E.R.C. ¶ 61,240 at p. 61,652 n.34 (1988) (under *Kentucky West I*, CPUC scrutinizes choices that SoCal makes as to its suppliers in setting retail rates); *Pennsylvania Power & Light Co.*, 23 F.E.R.C. ¶ 61,325 at p. 61,716 (1983) (FERC does not determine that purchaser's purchase is prudent; this is legitimate concern of the State).

By deeming DOE's import authorizations conclusively reasonable under the filed rate doctrine, and refusing even to consider the numerous DOE orders that directly contradict the Ninth Circuit's position, the Ninth Circuit's decision allows a monopoly LDC to thwart important federal interests by evading review under antitrust laws, and arguably under state regulatory laws, of its anticompetitive and imprudent conduct simply by buying imported gas from Canada or Mexico that the

DOE must automatically authorize. 15 U.S.C. § 717b(c). The Ninth Circuit's decision turns the NGA and the Sherman Act on their collective heads.

## II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The important question left unanswered in *Nantahala* and *MP&L* – whether a State may evaluate the prudence of a retailer's decision to buy a particular quantity of gas from one federally-approved source as opposed to another – must be settled to vindicate the State's vital interest under Section 1(b) of the NGA in protecting the captive ratepayers of a monopoly LDC, 15 U.S.C. § 717(b), and to resolve the conflict between the Ninth Circuit's decision and decisions of other federal circuits, state courts of last resort, and federal agencies that have applied or considered the *Nantahala/Pike County* exception.

In *Nantahala* and *MP&L*, this Court explained that the filed rate doctrine, as applied in federal preemption cases, is based on the principle that a State may not change or challenge whole rates, costs allocations or volumes mandated by a federal agency, or otherwise "trap" federally-mandated costs by denying their recovery in an LDC's retail rates. The rationale underlying the doctrine is that state action that precludes the recovery in retail rates of federally-mandated costs creates an impermissible conflict between federal and state directives. State action must therefore yield under the Supremacy Clause.

However, in *Nantahala*, this Court recognized, without deciding the issue, that "a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*." 476 U.S. at 972

(emphasis in original). Similarly, in *MP&L*, the Court stated "without purporting to determine the issue" that "it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power." *MP&L*, 487 U.S. at 374. In neither case did the Court need to resolve this issue because in both cases FERC had ordered a particular allocation of power, *"and no other."* *MP&L*, 487 U.S. at 373 (emphasis in original). The utility thus had no choice but to accept the FERC-ordered allocation.

Ignoring these principles, the Ninth Circuit stated below that "the question not answered in *Nantahala* concerned *rates* filed with *FERC*, whereas this case concerns *volumes* filed with *ERA*," and that such "difference is critical." Pet. App. A 15a (emphasis in original). However, this distinction is legally irrelevant. Conflict preemption under the filed rate doctrine arises only when a federal agency has *required* the utility to buy, or pay for, the particular supply of gas or power at issue, the costs of which the State then seeks to disallow in the utility's retail rates. In contrast, state action that bars recovery in retail rates of the costs of a particular supply that a federal agency has merely *authorized*, among other authorized supplies, for import and sale conflicts with no federal mandate nor otherwise subjects the utility to inconsistent state and federal agency orders.

Indeed, Congress was careful to preserve existing state authority to conduct prudence reviews of utility purchases when it amended Section 3 of the NGA in 1992 and deemed the importation of Canadian and certain other gas supplies to be in the public interest *per se*. 15 U.S.C. § 717b(c). Mindful of the NGA's purpose to close, not create, regulatory gaps, Congress made clear that:

> [A]utomatic approval, however, is not intended to modify the authority of the FERC or jurisdictional State commissions to review the prudence

> of the purchased gas when a jurisdictional utility seeks to include the cost of such natural gas in rates subject to the jurisdiction of the appropriate State or Federal agency. [¶] The public interest finding in this new section of the Natural Gas Act accordingly does not alter the authorities of the FERC or State commissions previously available with respect to the prudence of natural gas purchases.

138 Cong. Rec. H11404 (daily ed. Oct. 5, 1992) (bipartisan statement of Reps. Sharp, Markey, Moorhead & Lent).

The Ninth Circuit's decision below jeopardizes the very state authority to protect consumers that Congress so carefully sought to preserve. The decision also leads to untenable results. If ERA's discretionary public interest finding makes imported volumes of gas conclusively reasonable, then a congressionally mandated public interest finding under 15 U.S.C. § 717b(c) would similarly mean that imported volumes of gas, such as those from Canada, are conclusively reasonable. By this logic, an LDC could escape any review of its purchase of high-cost gas from the LDC's unregulated Canadian affiliate in lieu of purchasing lower-cost Canadian gas from other federally-approved sources. Neither ERA nor Congress intended such result.

## CONCLUSION

The Ninth Circuit has allowed a monopoly utility to hide behind the filed rate doctrine to stave off any challenges to its anticompetitive conduct by buying gas or electricity that a federal agency merely authorizes, but does not mandate, for import and sale. By doing so, the Ninth Circuit has not only denied the utility's captive and other customers a right to redress the harm caused by the utility's unlawful conduct, but it has also placed at serious risk the vital interest of States to ensure just and

reasonable retail rates for these captive customers. *Amici* therefore respectfully urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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December 11, 1997